

CSO 6217 Workgroup Issues:

1. **NOAA/EPA are now requiring conditionally-approved states to show how they are implementing a program rather than just demonstrating the state has the authority in place to implement the measures. This goes against CZARA and “g” guidance. NOAA/EPA are holding states to a higher standard now than before. See example of MS Clean Marina Program.**

Response: In accordance with Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), the purpose of state coastal nonpoint source pollution control programs is “to develop **and implement** management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities.” [16 USC §1455b(a), emphasis added.] Where states have described clear authorities for implementing particular management measures, NOAA and EPA have approved these measures. Where states are relying on voluntary programs and general bad actor laws, we allow states to demonstrate that their voluntary programs are working.

NOAA and EPA do not require full implementation of MM best practices to grant MM approvals. For states that choose to use a voluntary watershed planning process to address multiple MMs, we have requested that they not only develop a watershed planning process for fully implementing the approach over the 15-year implementation period, but also develop at least one watershed plan with a commitment to implement it to demonstrate the process has the ability to address the specific MM(s) of interest. We do not require implementation of the watershed plan to receive approval.

While we do not require implementation of the MMs, we certainly encourage states to demonstrate by example that they can implement the MMs. This can be shown via funding, technical assistance, and other program initiatives. What we need to see is that a state has the ability and intent to implement MMs with enforceable policies and mechanisms. So, seeing that implementation is actually happening is a great way to demonstrate that a state can use its EP&Ms to address coastal NPS.

The 1995 “Flexibility Guidance” allows NOAA and EPA to look at implementation when states are using voluntary, incentive-based programs to address conditions. The “Flexibility Guidance” states that conditional approval is designed to provide states with additional time to “demonstrate that existing authorities are adequate for ensuring implementation of the (g) measures” among other things. The guidance notes that: “States and territories that choose to demonstrate the ability to ensure widespread implementation of the MMs through voluntary or incentive-based programs backed by general state authorities may be given conditional approval for up to five years. NOAA and EPA will review a state or territory’s progress in implementing MMs after 3 yrs and assess whether the state or territory’s approach will achieve widespread implementation of the MMs or whether it will be necessary to obtain more specific authority by the end of the 5 yr period to ensure implementation of its coastal nonpoint program.”

In addition, the 1993 Program Development and Approval Guidance (“Green Book”) provides a “Description of the Implementation Process and Authorities” in Section III.C.3 (pp. 20-21), which notes that states will need to provide detailed information on how they will ensure implementation of the MMs in conformity with the (g) guidance. At a minimum, a state program will:

- Describe the scope, structure, and coverage of the implementation program

- Describe the organization, structure, and authorities of the state/local agency that has responsibility for implementing the program including identifying the lead agency (if outside the 319 or CZM programs, a description of how the lead agency and its authorities have been incorporated into the CNP) and a description of how the lead agency expects to implement the program including, for example, the number of staff and general responsibilities, cost of the program, and potential funding sources.
- Include a schedule with milestones for achieving full implementation of the MMs within 3 yrs
- Identify EP&M to ensure implementation. If that authority is outside the 319 or CZM programs, the state must include provisions to ensure that the governmental body with the statutory authority exercises that authority (i.e., MOUs, EOs, or administrative directives).
- Describe the mechanisms to improve coordination among state agencies and among state and local officials responsible for land use and water quality programs and permitting/enforcement, etc.
- Describe a process to identify practices to achieve the MMs.
- Describe activities to ensure continuing performance and long term effectiveness of the MM through proper O&M.
- Describe state activities to monitor the effectiveness of the (g) MMs.

These requirements are echoed in the “Administrative Changes” and “Flexibility Guidance” memos that provide additional guidance on how states can use voluntary programs, backed by EP&Ms, to satisfy their MM requirements. NOAA and EPA will approve those program elements for which states have proposed voluntary or incentive-based programs, backed by existing state enforcement authorities, if the following is provided:

1. a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;
2. a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures; and
3. a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

2. Significant turnover in NOAA/EPA staff since 2005 has contributed to a higher approval standard for states still conditionally approved.

Response: A strong core of staff at NOAA and EPA has remained in place for considerably longer than 2005. Allison Castellan (NOAA), Don Waye (EPA), and John Kuriawa all joined the “core CZARA team” in 2002. Josh Lott at NOAA and Robert Goo at EPA have been around much longer (Robert from the very beginning). The federal partners remain committed to ensure states are held to the same standards. However, if NOAA and EPA have erred with past decisions to approve something that we shouldn't have, we are not beholden to use these mistakes as precedent for future approval decisions. We need to follow the statute and our published guidance to evaluate consistency.

3. The CSO Workgroup seeks documentation of the clear standards that states must meet for program approval.

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Response: The standards that states must meet for program approval are presented in the following guidance documents and policy memos which are all available online at:

<http://coastalmanagement.noaa.gov/nonpoint/guide.html> (with the exception of the EP&M memo).

- Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters (EPA, January 1993)
- Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance (NOAA and EPA, January 1993)
- Flexibility for State Coastal Nonpoint Programs (NOAA and EPA, March 1995)
- Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) (NOAA and EPA, October 1998)
- Enforceable Policies and Mechanism for State Coastal Nonpoint Source Programs (NOAA and EPA, January 2001)
- Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Storm Water Regulations (NOAA and EPA, December 20, 2002)

4. A state is committed to applying an existing authority to address new NPS sources but has not used that authority to enforce against new NPS sources (e.g., ag, forestry) yet. How can a state show they are already implementing it?

The “Flexibility Guidance” notes that one of the purposes of “conditional approval” is to give states additional time to “demonstrate that existing authorities are adequate for ensuring implementation of the (g) measures. . . .States and territories that choose to demonstrate the ability to ensure widespread implementation of the MMs through voluntary or incentive-based programs backed by general state authorities may be given conditional approval for up to five years. NOAA and EPA will review a state or territory’s progress in implementing MMs after 3 yrs and assess whether the state or territory’s approach will achieve widespread implementation of the MMs or whether it will be necessary to obtain more specific authority by the end of the 5 yr period to ensure implementation of its coastal nonpoint program.” Therefore, a state can point to an example of how it has used an existing authority to enforce against new NPS sources during the conditional approval period.

Beyond providing a specific example of an enforcement action that occurs during the conditional approval period, a state could provide a memorandum from the agency head that applies the existing authority stating that the existing authority will henceforth be applied to address and used to enforce against new NPS sources (e.g., ag, forestry) to require implementation of the (g) measures, as appropriate. (See EP&M memo).

5. NOAA and EPA requesting states follow up on a 7 yr old interim decision is not appropriate and holds conditionally approved states to a higher standard.

Response: With regard to the specific Hawaii Site Development example, this matter has been resolved through follow-up correspondence with Hawaii. In this case, NOAA and EPA overlooked an earlier response for additional information that the state had previously provided, so a portion of a March 2012 interim decision document was incorrect. NOAA and EPA have stated that Hawaii’s Site Development Management Measure is approvable and will update its interim document with the updated information.

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With regard to the larger point, states should bear in mind that interim approvals have been a way for NOAA and EPA to help states focus on remaining conditions and provide guidance on how those conditions could be addressed. It is critical that states understand the distinction between interim and final approval. No decisions are final until the proposed decision has gone through public comment, potential ESA or Tribal consultation, and formal approval of a State's entire coastal nonpoint pollution control program has been conferred by the top administration officials at EPA and NOAA that have been delegated the authority for these final approvals. This reminder appears in the cover letter of all formal interim decision documents transmitted to the States. If the federal partners learn that facts on the ground have changed sufficiently to call an interim decision into question prior to formal and final program approval, then the federal partners have an obligation to inform the State that the prior interim decision is in jeopardy. An easy example of this is if a State relied on one of its statutes or a regulation to meet a particular management measure and then that law or rule was rescinded or substantially altered prior to formal final program approval.

States were originally supposed to address all their conditions within a few years. However, given the complexities of the 6217 program, now 14/15 years have passed since most states received conditional approval. Given the significant time that can pass between when NOAA and EPA initially issue an interim approval and when NOAA and EPA are ready to announce our intent to fully approve a state's program in the federal register, it is very likely we will need to work closely with the state to update all approval rationales to ensure the programs and authorities discussed within them are still applicable and the most current status of those programs are reflected.

The acid test is this: The federal partners should not proceed to final program approval (via federal register notice) if they believe that a State does not meet all of its outstanding conditions. Our rationales for how the state has addressed its original condition must be programmatically and legally defensible. This has only become increasingly important in light of the Oregon lawsuit and the increased outside scrutiny of state programs, including Washington State's pending final approval. If the facts on the ground have not changed "for the worse", NOAA and EPA do not revisit management measures that were fully approved when a state received conditional approval, but we do have an obligation to ensure that rationales for approval are up-to-date and defensible. See state conditional approval findings posted here:

http://coastalmanagement.noaa.gov/nonpoint/pro_approve.html

6. NOAA/EPA approved Maryland and American Samoa's OSDS inspection programs based on their plans to implement inspection programs while Florida had to provide an extensive 15 yr plan, backed by funding, to inspect every system in the state on a 5 year interval.

What FL provided to address their OSDS inspection program is in line with what the coastal nonpoint program guidance and memos say that states must provide to achieve full approval (see also response to #1).

In addition, NOAA and EPA will accept a program that inspects systems at the time of sale of the property/home or a program that focuses on inspection on identified problem areas (e.g., lots with older OSDS, known high failure rates, or known OSDS-induced water quality problems), consistent with

available resources, if there is sufficient commitment on the part of the state to implement (e.g., commitment to provide staff/resources to all problem areas in the 6217 management area over time).

American Samoa's approach is similar to what we requested of FL, just at a much smaller scale, given the size differences between the two). AS committed to funding state staff to conduct 40 OSDS inspections/week so that all systems in the territory would be reached after 15 yrs.

[ADD MORE ADDRESSING MD??] [I WILL TRY TO PROVIDE MORE DETAILS REGARDING MD, BUT THE IRONIC THING IS THAT REGARDLESS OF WHAT WAS APPROVED, MARYLAND NOW STANDS AS ONE OF THE FEW STATES ACTUALLY TAXING RESIDENTS TO PAY FOR OSDS MAINTENANCE, UPGRADES, AND CONVERSIONS TO SEWER.] How's this?

The rationale for approving Maryland's OSDS inspection program is not consistent with our national guidance and with what we have applied to other states. Because of this inconsistency, NOAA and EPA acknowledge this error and apologize for it. We should not use this as a precedent for future approvals of this element of the OSDS management measure. That said, Maryland's OSDS program is particularly strong, particularly with regard to O&M of existing systems. NOAA and EPA's rationale for approval is the problem here, not the state of Maryland's OSDS program.

7. **Requirements that OSDS programs must be proactive to prevent failure is not consistent with the 6217 (g) guidance because the inspection MM requires inspections at a frequency adequate to ascertain (i.e., discover, after the fact) whether OSDS are failing. Also, there is no language in these documents about the way the inspections are conducted—are they visual inspections?**

NOAA and EPA disagree with this interpretation that ascertaining whether OSDS are failing is not proactive. The first element of this MM is to "establish and implement policies and systems to ensure that existing OSDS are operated and maintained to prevent the discharge of pollutants to the surface of the ground and to the extent practicable, reduce the discharge of pollutants into the ground waters that are closely hydrologically connected to surface waters." Therefore, requiring proactive measures to prevent OSDS failure is consistent with the 6217 (g) guidance. It was never the intent of this element for states to rely on complaint-based systems, which are reactive rather than proactive, to ascertain failure rates, and we have maintained this consistently. The (g) guidance recommends that requiring scheduled pumpouts, regular maintenance, and frequent inspections are the keys to achieving the most cost-effective OSDS pollutant reductions. The (g) guidance also notes that inspections at the time of property transfer are also good ways to ensure OSDS are operating properly (see pgs. 4-113, 4-115-4-116). Visual inspections are not mentioned in the (g) guidance as effective for ascertaining failure rates.

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Response: In accordance with Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), the purpose of state coastal nonpoint source pollution control programs is “to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities.” [16 USC §1455b(a), emphasis added.] Where states have described clear authorities for implementing particular management measures, NOAA and EPA have approved these measures. Where states are relying on voluntary programs and general bad actor laws, we allow states to demonstrate that their voluntary programs are working.

NOAA and EPA ~~generally cannot, and do not, require full implementation of MM best practices to grant MM approvals. For states that choose~~ The one caveat to this would be when states propose to use a voluntary watershed planning process to address multiple MMs. In that case, we have requested that states they not only develop a watershed planning process for fully implementing the approach over the 15-year implementation period, but also develop at least one watershed plan with a commitment to implement it to demonstrate the process has the ability to address the specific MM(s) of interest. This is consistent with the “Bottom Lines” document that says the state can address the water protection measure in one or two watersheds if they have a process in place to implement a similar approach across all watersheds over time. Of course, w~~We do not require implementation of the watershed plan to receive approval.-~~

Ex. 5 - Deliberative

While we do not require implementation of the MMs, we certainly encourage states to demonstrate by example that they can implement the MMs. This can be shown via funding, technical assistance, and other program initiatives. ~~Having the ability to implement MMs with enforceable policies is what we need to see is that a state has the ability and intent to implement MMs with enforceable policies and mechanisms. So, seeing that implementation is actually happening is what we ultimately want, and also a great way to prove to us~~demonstrate that a state can use its EP&Ms to address coastal NPS.

~~However,~~ the 1995 “Flexibility Guidance” does allow NOAA and EPA to look at implementation when states are using voluntary, incentive-based programs to address conditions. The “Flexibility Guidance” states that conditional approval is designed to provide states with additional time to “demonstrate that existing authorities are adequate for ensuring implementation of the (g) measures” among other things. The guidance goes on to notes that: “States and territories that choose to demonstrate the ability to ensure widespread implementation of the MMs through voluntary or incentive-based programs backed by general state authorities may be given conditional approval for up to five years. NOAA and EPA will review a state or territory’s progress in implementing MMs after 3 yrs and assess whether the state or territory’s approach will achieve widespread implementation of the MMs or whether it will be necessary to obtain more specific authority by the end of the 5 yr period to ensure implementation of its coastal nonpoint program.”

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- ~~"Bottom Lines" for the Coastal Nonpoint Program~~ (NOAA, November 2001)
- Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Storm Water Regulations (NOAA and EPA, December 20, 2002)

4. A state is committed to applying an existing authority to address new NPS sources but has not used that authority to enforce against new NPS sources (e.g., ag, forestry) yet. How can a state show they are already implementing it?

The "Flexibility Guidance" notes that one of the purposes of "conditional approval" is to give states additional time to "demonstrate that existing authorities are adequate for ensuring implementation of the (g) measures. . . . States and territories that choose to demonstrate the ability to ensure widespread implementation of the MMs through voluntary or incentive-based programs backed by general state authorities may be given conditional approval for up to five years. NOAA and EPA will review a state or territory's progress in implementing MMs after 3 yrs and assess whether the state or territory's approach will achieve widespread implementation of the MMs or whether it will be necessary to obtain more specific authority by the end of the 5 yr period to ensure implementation of its coastal nonpoint program." Therefore, a state can point to an example of how it has used an existing authority to enforce against new NPS sources during the conditional approval period.

~~Other than~~ Beyond providing a specific example of an enforcement action that occurs during the conditional approval period, a state could provide a memorandum from the agency head that applies the existing authority stating that the existing authority will ~~now~~ henceforth be applied to address and used to enforce against new NPS sources (e.g., ag, forestry) to require implementation of the (g) measures, as appropriate. (See EP&M memo).

Comment [Don2]: This seems confusing. Can you clarify?

5. NOAA and EPA requesting states follow up on a 7 yr old interim decision is not appropriate and holds conditionally approved states to a higher standard.

Response: With regard to the specific Hawaii Site Development example, this matter has been resolved through follow-up correspondence with Hawaii. In this case, NOAA and EPA overlooked an earlier response for additional information that the state had previously provided, so a portion of a March 2012 interim decision document was incorrect. NOAA and EPA have stated that Hawaii's Site Development Management Measure is approvable and will update its interim document with the updated information.

With regard to the larger point, states should bear in mind that interim approvals have been a way for NOAA and EPA to help states focus on remaining conditions and provide guidance on how those conditions could be addressed. However, it is critical that states need to remember understand the distinction between that interim approval is not and final approval. No decisions are final until the proposed decision has gone through public comment, potential ESA or Tribal consultation, and formal approval of a State's entire coastal nonpoint pollution control program has been conferred by the top administration officials at EPA and NOAA that have been delegated the authority for these final approvals. This reminder appears in the cover letter of all formal interim decision documents transmitted to the States. If the federal partners learn that facts on the ground have changed sufficiently to call an interim decision into question prior to formal and final program approval, then the federal partners have an obligation to inform the State that the prior interim decision is in jeopardy. An easy example of this is if a State relied on one of its statutes or a regulation to meet a particular management measure and then that law or rule was rescinded or substantially altered prior to formal final program approval.

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http://coastalmanagement.noaa.gov/nonpoint/pro_approve.html)

~~Regarding the specific HI example, the state never responded to our original questions in 2005 and must still address so that the programmatic record is complete.~~

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6. NOAA/EPA approved Maryland and American Samoa's OSDS inspection programs based on their plans to implement inspection programs while Florida had to provide an extensive 15 yr plan, backed by funding, to inspect every system in the state on a 5 year interval.

What FL provided to address their OSDS inspection program is in line with what the coastal nonpoint program guidance and memos say that states must provide to achieve full approval (see also response to #1).

In addition, the "Bottom Lines" document states that: "NOAA and EPA will accept a program that inspects systems at the time of sale of the property/home or a program that focuses on inspection on identified problem areas (e.g., lots with older OSDS, known high failure rates, or known OSDS-induced water quality problems), consistent with available resources, if there is sufficient commitment on the part of the state to implement (e.g., commitment to provide staff/resources to all problem areas in the 6217 mgmt management area over time.)"

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Comment [AC3]: Note: This is based on my fuzzy memory as I was not involved with the AS approval since that occurred soon after I started here. I tried looking in our files and could not find documentation of their submission but I assume it is similar to CNMI's (which we do have) since we shared AS's approach with CNMI so that they can get approval. Does anyone else have documentation of AS's OSDS inspection submittal to confirm my fuzzy memory?

7. Requirements that OSDS programs must be proactive to prevent failure is not consistent with the 6217 (g) guidance because the inspection MM requires inspections at a frequency adequate to ascertain (i.e., discover, after the fact) whether OSDS are failing. Also, there is no language in these documents about the way the inspections are conducted—are they visual inspections?

NOAA and EPA disagree with this interpretation that ascertaining whether OSDS are failing is not proactive. The inspection element does note that inspections need to be conducted at a frequency to determine whether or not systems are failing. However, the first element of this MM is to "establish and implement policies and systems to ensure that existing OSDS are operated and maintained to prevent the discharge of pollutants to the surface of the ground and to the extent practicable, reduce the discharge of pollutants into the ground waters that are closely hydrologically connected to surface waters." Therefore, requiring proactive measures to prevent OSDS failure is consistent with the 6217 (g) guidance. It was never the intent of this element for states to rely on complaint-based systems, which are reactive rather than proactive, to ascertain failure rates, and we have maintained this consistently.

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The (g) guidance ~~goes on to~~ recommends that requiring scheduled pumpouts, regular maintenance, and frequent inspections are the keys to achieving the most cost-effective OSDS pollutant reductions. The (g) guidance also notes that inspections at the time of property transfer are also good ways to ensure OSDS are operating properly (see pgs. 4-113, 4-115-4-116). Visual inspections are not mentioned in the (g) guidance as effective for ascertaining failure rates.